

Access To Justice for Intergenerational Equity as Judicial Remedy for Climate Change Litigation

Josua Hari¹, Netty S.R. Naiborhu²

{josuaharimm@gmail.com, netty.naiborhu@gmail.com}

Sekolah Tinggi Hukum Bandung, Indonesia^{1 2}

Abstract. Sustainable development, a core principle of environmental law, seeks to meet current generation needs without jeopardizing future generations. The legal system employs administrative, civil, and criminal laws, each serving distinct enforcement purposes. Climate change, resulting from non-renewable resources activities' green-house gas emissions, trigger far reaching and lasting effects. Addressing this demands a comprehensive, long-term strategy due to its cascading nature. Climate change policy divides into adaptation and mitigation. Adaptation employs legislation to tackle climate change while mitigation centers on enforcement against environmental violations. Restorative justice, typically a criminal law concept, strives for equity between offenders and victims. This notion could extend to environmental law, necessitating an all-encompassing approach. Ultimately, the law should ensure not only certainty but also justice.

Keywords: Climate Change, Restorative Justice, Sustainable Development

1 Introduction

From October 2019 to May 2020, there were around 643 environmental case decisions with the object of the decision being environmental case decisions in the State Administrative Court (TUN) and general courts especially those handling criminal and civil matters. Legal efforts against violations are carried out by handling, overcoming and restoring to achieve the law enforcement. Based on 73 civil case decisions, there are 18 decisions which contain compensation for material losses, dwangsom, bestuursdwang and/or recovery costs. These details are not all of the decisions imposing penalties for compensation for losses, dwangsom, bestuursdwang and environmental restoration simultaneously as well as the absence of dwangsom and recovery costs in the mining sector.

To avoid unintended of climate change effect, it should be implementing a restorative justice system approach in overcoming multiple issues in the environmental legal system, judicial mechanism and final decision results which tend not to have a restorative effect on the environment that has been contaminated or loss based on Article 54 (1) UUPPLH. This issue requires research on the implementation of restorative justice in environmental cases, specifically using the benefit justice model. The study should explore legal consequences that arise when stakeholders agree to restore the damage or polluted or environment to provide ecological benefits, rather than solely relying on compensation and deterrent effects. Restorative

justice is a form of case settlement that intended to create fair law enforcement that prioritizes progressive law in resolving cases through restorative justice which not only looks at legal aspects but also at benefits and justice.

One development in environmental law is the integration of environmental and human rights. This relationship is becoming increasingly important as we recognize the impact that corporations have on the environment and the people who live in it. According to John Ruggie, the UN Guidelines on Business and Human Rights established a relationship between stakeholders, which is formulated through the role of the state with corporations and the community. The objective is to create a protection against the impact of business activities by protecting, respecting, and remedying in the development process. The concept of ecological constitution ensures that every act of pollution or damage to the environment can be held accountable. Therefore, the author formulates the problem question as how the concept of restorative justice is a progressive legal effort in environmental legal enforcement related to climate change issues to support sustainable development?

2 Method

This study employs document and literature studies as data collection techniques. It focuses on library materials, making it a form of normative research, also known as doctrinal or library research. The normative legal research approach follows a statute-based approach. This approach is commonly referred to as normative juridical. It involves searching for answers to problems and research objectives based on the framework of normative legal theory. This theory is used to analyze data theories that are commonly known in doctrinal legal theory, such as legal principles, legal definitions, and so on. The approach involves examining all laws and regulations related to the legal issues that are often encountered. This research approach prioritizes legal materials, such as laws and regulations, as the fundamental reference for conducting research. The statutory approach is commonly used to examine regulations that may still lack normalization or even foster deviant practices, both technically and in their implementation in the field. The case approach involves building legal arguments based on concrete cases that occur in the field. This research will use analytical description to describe the reality and facts related to environmental crimes. The data used will be secondary data sourced from primary, secondary, and tertiary legal materials. The research method used is qualitative, which produces descriptive analytical data.

3 Result and Discussion

Legal remedies related to climate change include facilities available at regional and central levels, obstacles faced by courts in climate change cases, and the relationship between the court and other institutions and stakeholders. The Urgenda case is an example of a successful climate change case in which the Dutch government was sued to reduce gas emissions by 25%. However, the court only acted as a facilitator by providing facilities for the implementation of effective legal remedies. It did not issue an order to the government to change its policy to achieve this target, nor was it given the necessary time to do so.

Handling climate change cases is a complex issue as they are intertwined with human rights. Therefore, it is crucial for courts and governments to establish a minimum standard to assess the relevance and accountability of policies. While courts play a role in handling climate change cases, they require support from policymakers, the government, and the community. The court has the authority to assess and determine whether the government has implemented a law made by the legislature and whether there has been a violation of rights in enforcing the law. Jolene Lin referred to this as 'regulating the regulatory response.' This means that the court needs to review the extent to which the state performs its functions based on the public trust doctrine. The public trust doctrine holds that all natural resources are controlled by the state and used for the welfare of the community. Each generation has rights over these resources, and the interests of future generations must also be considered.

The legal system and statutory regulations can complement each other in filling legal voids and creating benefits when used simultaneously. The question is how to coordinate these systems so that they function together as non-overlapping safeguards against risks from policies and mechanisms in ecosystems. Each system has a focus on procedures and institutional characteristics. The legal system prioritizes interpersonal relations and emphasizes reparation rather than prevention. It determines responsibility based on the actual occurrence of harm and the underlying reasonableness of the activity. In contrast, the legal system prioritizes preventing environmental damage from the outset by recognizing the risks associated with certain activities and addressing them at the community level. Despite the legal concept, it is possible for both parties to work together in an institution. The impact of human activities on increasing greenhouse gas concentrations means that no natural system will be free from significant human influence. One unique aspect of common law is its focus on relationships between individuals, including environmental management, rather than just general laws and regulations.

3.1 Progressive Legal Perspective in the Concept of Restorative Justice

Laws and regulations cannot stand alone and must be interpreted in context. Relying solely on statutory benchmarks may lead to unsatisfactory results. It is important to read and understand the laws and regulations to accurately assess the legal situation of a nation.

Restorative Justice is a concept that has already established its indicators and objectives in the criminal law field. If further developed, it could represent a progressive legal breakthrough. The law should not only function to regulate human behavior in a mechanistic and formalistic way, but also provide fulfillment of rights. It is important to avoid violating the rights of citizens. Through a breakthrough, progressive law aims to make liberation, both in the way of thinking and acting in direction, so that it can fulfill its duties to serve humans and humanity.

There has been a paradigm shift in the concept of justice, moving from retributive justice (punishment) to restitutive justice (compensation) and finally towards restorative justice (improvement and restoration of conditions). Retributive justice in settling criminal cases has recently received significant criticism for failing to provide satisfaction to the community, particularly the victims, as it views perpetrators as mere objects that must be punished. In contrast, the legal interests of victims are given less attention.

The principle of restorative justice should not be viewed as a method of peacefully ending cases, but rather as a means of fulfilling the sense of justice for victims, perpetrators, local communities, and investigators/mediators. During the prosecution stage, the peace process is carried out voluntarily through deliberation to reach a consensus, without any pressure, coercion, or intimidation. In the peace process, the Public Prosecutor acts as a facilitator. The public prosecutor has no personal or professional interest or connection with the case, victims, or suspects, either directly or indirectly.

Regarding environmental protection and management, Law No. 32 of 2009 on Environmental Protection and Management (UUPPLH) regulates environmental restoration in Article 54, Article 85, and Explanation of Article 87 paragraph (1). Restorative justice opportunities are legally provided in Article 85 letter b of the UUPPLH, which aims to resolve the consequences and/or damage caused by pollution in a non-litigation manner. Article 86, paragraph (1) of the UUPPLH provides provisions for out-of-court environmental settlement. The purpose of this settlement is to reach an agreement on the form and amount of compensation for environmental pollution and damage, as well as certain actions and preventive measures to prevent future pollution and destruction. This rule embodies the principles of restorative justice by allowing the community and those responsible for environmental pollution and destruction to voluntarily resolve disputes without resorting to legal action. Article 85 paragraph (1) of the UUPPLH provides an opportunity for a restorative meeting of the parties to resolve environmental cases through deliberation. However, Article 85 paragraph (2) specifies that dispute settlement out of court does not apply to environmental crimes as stipulated in the Law. Environmental cases that can be resolved out of court are considered civil environmental cases. However, in practice, environmental cases often involve criminal elements. Civil issues may be considered as an alternative settlement or an option to sue for compensation, but the case itself is criminal in nature. The provisions of Article 85, paragraph (2), appear to be inconsistent with the general explanation of the UUPPLH. According to the explanation, environmental criminal law enforcement should only be applied as a last resort after administrative law enforcement has been deemed unsuccessful, in accordance with the *ultimum remedium* principle.

Under the UUPPLH, anyone who pollutes or damages the environment is required to restore its functions. This can be achieved by stopping the source of pollution, cleaning up pollutants, or using methods such as remediation, rehabilitation, restoration, or other scientifically and technologically appropriate means. Furthermore, the main purpose of restorative justice is to increase community involvement and public awareness in settling with the law, making perpetrators responsible for their actions, understanding the impact of their actions, and trying to correct what they have done. Restorative justice aims to help minimize crime. (1) Install or repair a waste treatment unit to ensure compliance with specified environmental quality standards. (2) Restore environmental function. (3) Eliminate or destroy the causes of environmental pollution and/or damage. The mentioned articles have regulated this matter, and it is important to adhere to them.

In Article 471 of Government Regulation Number 22 of 2021 concerning Guarantee Funds for Restoration of Environmental Function, the implementation of the environmental guarantee fund requires the holder of the environmental agreement to deposit a security amount in a government-appointed bank. The money handed over serves as a 'guarantee' for implementing environmental restoration activities and/or pollution control or other environmental

management purposes. This article aims to optimize the application of restorative justice in enforcing environmental law.

Meanwhile, the obstacles faced in addressing climate change are related to the causal connection between actions and their consequences, as stipulated in Article 1365 of the Civil Code. Therefore, a progressive shift in thinking is necessary to ensure access to justice and support sustainable development. According to the law on environmental protection and management, victims of environmental pollution can request civil remedies in the form of compensation. There are two types of liability: fault-based systems and strict liability. In fault-based systems, compensation can only be awarded if there is a fault. Strict liability, on the other hand, does not require proof of fault to claim compensation. The concept of strict liability originated from the common law system. Strict liability in Indonesia is only applied to cases of environmental pollution and damage caused by activities that have a large and significant impact on the environment. Progressive law has led to breakthroughs in legal subjects and their interests. For example, the environmental legal subject now has rights and can receive assistance. Additionally, other legal subjects have a role to play if their rights are violated. Another breakthrough is the recognition of the interests of legal subjects that do not yet exist, such as the rights to a good environment and the sustainable utilization of natural resources (SDA) for future generations. Addressing the impact of climate change is a complex task as its effects are not immediately visible and require a long-term approach. In addition to mitigating environmental damage, it is necessary to implement short-term measures, medium-term compensation, and long-term recovery actions. The concept of restorative justice aims to find a mechanism to resolve legal problems, whether through legislation or litigation, that benefits humans and not just the law.

Laws and statutes cannot stand alone, they are completely autonomous and have absolute authority. If we highlight the legal life of a nation only by using legal benchmarks, the results obtained will not be satisfactory. This means that we cannot get an idea of the actual legal situation just by reading the laws and regulations.

The concept of Restorative Justice is considered only in the field of criminal law which has previously established the indicators and objectives of this concept. If it is possible to develop it, it will be a progressive legal breakthrough, where the law not only functions to regulate humans, which tends to end up being mechanistic and formal, but can also provide fulfillment of rights if the law is felt to violate the rights of citizens. Through breakthroughs, progressive law aims to achieve liberation, both in the way of thinking and acting in law so that it is able to fulfill its duties of serving humans and humanity.

There is a shift in the paradigm of justice, which was initially retributive justice (retaliation), then restitutive justice (providing compensation) and then towards restorative justice (improvement and restoration of conditions). The view of retributive justice in resolving criminal cases today has begun to receive a lot of criticism because it does not provide satisfaction for society, especially victims, because retributive justice only views the perpetrator as an object that must receive retribution, while the legal interests of the victim receive less attention.

The principle of restorative justice cannot be interpreted as a method of peacefully terminating cases, but rather to fulfill the sense of justice for victims, perpetrators, local communities and investigators/investigations as mediators. In the prosecution stage, the peace process is carried

out voluntarily, with deliberation to reach consensus, without pressure, coercion and intimidation. In the peace process the Public Prosecutor plays a role as a facilitator. The Public Prosecutor has no interest or connection with the case, victim or suspect, either personally or professionally, directly or indirectly.

In relation to environmental protection and management, environmental restoration is regulated in Article 54, Article 85, and Elucidation to Article 87 paragraph (1) of Law No. 32 of 2009 concerning Environmental Protection and Management (UUPPLH). Opportunities for implementing restorative justice juridically are regulated in Article 85 letter b UUPPLH which states that actions to restore the consequences and/or damage to pollution can be resolved non-litigationally. Article 85 paragraph (1) of the UUPPLH provides that the aim of environmental settlement outside of court is to reach an agreement regarding the form and amount of compensation, recovery due to environmental pollution and destruction, certain actions and preventative measures to prevent pollution and destruction from happening again. This regulation reflects the spirit of restorative justice because it provides space for the community and perpetrators of environmental pollution and destruction to resolve disputes voluntarily without going to court. Even though Article 85 paragraph (1) UUPPLH provides an opportunity for a restorative meeting of the parties to resolve environmental cases through deliberation, Article 85 paragraph (2) states "Dispute resolution outside of court does not apply to environmental crimes as regulated in the Law This". This means that environmental cases that can be resolved outside of court are civil environmental cases, but in practice environmental cases tend to contain more criminal elements, civil problems are only an alternative solution or an option to claim compensation even though in fact the case is a criminal case. The provisions of Article 85 paragraph (2) are not in accordance with the general explanation of the UUPPLH which states that enforcement of environmental criminal law continues to pay attention to the principle of *ultimum remedium* which requires the implementation of criminal law enforcement as a last resort after the implementation of administrative law enforcement is deemed unsuccessful.

In the UUPPLH, every person who pollutes or destroys the environment is obliged to restore environmental functions, which can be done by stopping the source of pollution, cleaning polluting elements, remediation, rehabilitation, restoration, and/or other methods that are in accordance with developments in science and technology. Furthermore, the benefits of restorative justice itself are to increase community involvement and public awareness in efforts to resolve with the law, make perpetrators responsible for their actions, understand the impact and try to improve what they have done, help minimize crime because the main goal of restorative justice is recovery while retribution is second goal.

According to the explanation of Article 87 Paragraph (1), the provisions in this paragraph are the realization of a principle existing in environmental law called the polluter pays principle. Apart from being required to pay compensation, environmental polluters and/or destroyers can also be burdened by judges to carry out certain legal actions.

3.2 Sustainable Development Against Climate Change

At the national level in 2015, a group in the Netherlands sued the Dutch government regarding its gas emission reduction policy and won the case. Even though it still invites a lot of debate,

from this case it can be seen that it is possible to use court institutions to facilitate constitutional complaints that have been violated by the government policies which do not coherent with international provisions relating to climate change and shows that climate change cases are urgent and crucial. Then, courts have strategic role, which is important in the formation of climate change policy.

"if government is unable to handle the climate change problems based on regulations, courts should settle the dispute". It means, in case the government cannot make adequate regulations or cannot implement existing regulations, the role of the courts is needed to make them happen. The challenges faced by the court in realizing this are related to the aspect of burden sharing regarding necessary and compulsory actions in climate change policy and in contrast to the government (executive power) that could push other countries to force them adopted sufficient provisions dealing with climate change issue. Court can rely that through its decision other countries can follow it when facing climate change cases. The role of the courts is important to establish transparency and accountability in democracy. It is based on the process of legitimate the legal norms creation in society, such as public participation because the function of court is that as the authority to handle climate change cases if the government cannot make a policy based on the principle of openness involving various interest.

Legal remedies related to climate change as follows: supportive facilities at both local and national levels, obstacles faced by courts in disputes of climate change, court relations with other organs and concerned parties. Urgenda is a case regarding climate change that successfully sued the Government of The Netherlands to reduce gas emissions by 25%. However, it turns out that the court only play a role to facilitate for the implementation of effective legal action but does not give orders to the government to change its policy to achieve this target and is not given the time period needed to change the policy. The court even stated that the government was given the freedom to determine how to comply with reducing gas emissions, resulting in a shift in the description of the duties of the court, which should have the authority to order and supervise the government's performance as an implication of the decision.

The sue of the plaintiff requests that the court in The Netherlands provide access of information of the government actions and decisions for public information disclosure to the people but the court stated that executive powers has its own capacity to decide and implement regulations. On the contrary, the settlement of climate change disputes requires direct dispute resolution by administrative instruments, it means instead of citizen rights and interest aspects contained in the constitution. This indicates that the court's perspective regarding climate change matters is limited to procedural field that should have been fulfilled, implementing of the jurisdiction based on role and function of the institutions, the performance of current tools or regulations (administrative and civil law instruments) partially. , criminal) so that law enforcement does not run optimally, effectively and efficiently.

The internalization of environmental aspect into the sustainable development process is a philosophical basis for national development, even though in reality it shows that the intensity of destruction and/or pollution always occurs and threatens the common. Based on juridical perspective, sustainable development principle is a way to fulfill the needs of our generation without compromising future generation interest to use every aspect in environmental law such as natural resources, development, and any others matters like economic and social. It should be guarantee by the state through government and it is called state responsibility. However, environmental pollution and damage that cannot be avoided, even though legal instruments such

as the UUPPLH have been established as a preventive and repressive effort to ensure the survival of the environment from threats and disturbances by the society and private actors in carrying out their business activities.

The state's efforts to carry out law enforcement are aimed at renewing the UUPPLH through the Job Creation Law which was formulated by prioritizing economic balance. An increase in development activities carries the risk of environmental destruction and/or pollution so that the fundamental basis and role of environmental that has function to support life will be contaminated. The principle of preserving environmental functions requires everyone to maintain environmental preservation, prevent and avoid ecocide and pollution. When facing the disruption of economic growth, environmental preservation has to be the basis for industrial companies commitment as the principle that actualizing its economic activities considering that preserving the function of the environment is a juridical instrument that must not be ignored.

Supervision is also an important consequence in development process based on Article 70 of UUPPLH, the involved of public participation for environmental decision making must be enacted so that they can get access to justice through executive power and administrative law mechanism including judicial procedural through the PTUN and / or MK as recognition of constitutional rights in community participation in the environment. To sum up, it is necessary to integrate Ecological (environment) aspects with economic (business and business actors) matters, and social (community) field as stakeholders.

To establish democratic government, the government has a function to manage and regulate for fulfilling fundamental rights of the citizens such as to serve, to protect, and to fulfill. Furthermore, in the process of development, the government has to rely on the basis of the rule of law principle that combined with governance. As Lawrence Friedman stated that in a legal system is divided into sources of law, which forms law making process and institutions or authoritative organs that get its powers from legitimate basis such as attribution, delegation, mandate to implement the regulation or policy and also enforce it. law. So that Good Governance is implemented as a guideline in implementing SDGs as a global development in the use of natural resources which is adjusted to the legal system contained in UUPPLH No. 32/2009.

Indonesia's commitment towards climate change is stated in Intended Nationally Determined Contributions (INDC) which contains an outline of development planning and achieving sustainable development submitted to the United Nations Framework Convention On Climate Change (UNFCCC) which results in all countries The parties have agreed to implement obligations and take concrete action from the Paris Agreement in order to move towards climate change which is a major threat to the welfare of society and global development. This idea continues at the Conference of Parties (COP 26), the climate conference is a climate change event attended by world leaders which was held in Glasgow, Scotland in early November 2021. There are 2 concepts related to handle climate change matters accordance to reach sustainable development goals. Firstly, it is related to reduce emissions of GHG in the INDC and secondly, is related to achieving sustainable development goals in the SDGs, both of which are seen from a global level scope which is translated into a national scope.

Restorative Justice is a concept that considered only in the field of criminal law which has previously established the indicators and objectives of this concept. With the existence of Article 54 UUPPLH as a concrete form of requiring every person who causes pollution and/or damage

to restore the function of the environment. In this way, if it is possible to develop it, it will be a progressive legal breakthrough, where the law not only functions to regulate humans, which tend to end up tending to be mechanistic and formal, but can also provide the fulfillment of rights if the law is felt to violate the rights of citizens. The obstacles faced in the case of climate change are related to the causality between actions and the resulting consequences as regulated in Article 1365 of the Civil Code, so that progressive thought breakthroughs are needed in fulfilling access to justice to support sustainable development. The criteria for filing an Unlawful Act lawsuit are: has suffered a particularized injury, the injury is fairly traceable to the defendant's actions, and the court has the ability to award relief that will redress the plaintiff's injury.

Through progressive law, several breakthroughs discussed are regarding legal subjects related to their interests (the environment as a legal subject that has interests and requires assistance and the role of other legal subjects if their rights are violated) as well as the interests themselves related to the existence of legal subjects that do not yet exist but whose interests already exists (the right to a good environment and the use of natural resources for future generations). Of course, it is not easy because the impact of climate change is not immediately visible and takes quite a long time. Apart from that, environmental pollution/damage requires short-term (control), medium-term (compensation) and long-term recovery measures. Through the concept of restorative justice, it is hoped that a mechanism can be found to resolve these problems, whether through legislation or litigation, so that the law can function and be useful for humans and not just humans for the law.

4 Conclusion

Restorative Justice can be a significant legal advancement, particularly in the enforcement of environmental law. This is because the law not only regulates human behavior but also considers the interests of the environment and future generations. It is a progressive approach that can lead to positive outcomes. State administrative law instruments function to prevent and control legal issues related to the interests of legal subjects, including the environment. This is necessary for fulfilling access to justice and supporting sustainable development. Additionally, technical term abbreviations should be explained when first used. The text should adhere to conventional academic structure and formatting, including consistent citation and footnote style. The text should be grammatically correct and free from spelling and punctuation errors. No new content should be added beyond what is provided in the original text. State administrative law instruments function to prevent and control legal issues related to the interests of legal subjects, including the environment. It is important to use clear and concise language, avoiding complex terminology and ornamental language. Biased language should be avoided, and positions on subjects should be made clear through hedging. Civil law instruments can be utilized based on the principle of absolute responsibility and legal construction based on Article 1365 of the Civil Code. These instruments can be filed through class action and environmental organization lawsuits, as well as complementary criminal law instruments based on the principle of subsidiarity. The impacts of climate change require short-term (mitigation), medium-term (compensation), and long-term actions by carrying out environmental restoration. Restorative justice provides a mechanism to resolve legal issues, whether through legislation or litigation, that benefits humans and ensures the proper functioning of the law.

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